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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 103.

DISTRICT OF COLUMBIA,

Petitioner,

vs.

ETHEL CLAWANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

SETH W. RICHARDSON,
815 15th Street, N. W.,
Washington, D. C.

ALLEN CARUTHERS,
551 5th Avenue,
New York City, N. Y.,

LILLIAN CLAWANS,
116 Market Street,
Newark, N. J.,
Attorneys for Respondent.

DAVIES, BEEBE, BUSICK & RICHARDSON,
of Counsel.

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DISTRICT OF COLUMBIA,

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ETHEL CLAWANS,

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion below appears on page 23 of the record, and has been officially reported in 84 Fed. (2nd) 265.

Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended.

Summary of Argument.

1. The defendant was entitled to a jury trial under Article 3, Section 2, Clause 3 and the 6th Amendment of the U. S. Constitution and the Common Law cannot be invoked to sustain the conviction.

2. The proof of the purchase of the unused portion of three railroad tickets, solicited by the purchasers from the defendant on March 24th, April 7th and April 28th, 1935, in the Union Station at Washington, D. C., with no other proof of defendant's occupation or business did not constitute engaging in the business of the second-hand dealer under the code of the District of Columbia.

3. The rights of defendant were prejudicially impaired by the rulings of the trial court on cross examination of the prosecuting witnesses.

4. The defendant, under the record, was not given a fair trial.

5. The trial court should have sent the case to another Judge after defendant filed an affidavit of prejudice.

Statement.

Defendant is a young woman residing at Newark, New Jersey (R., 26). She was arrested on Sunday, May 12th, 1935, under a warrant issued upon the filing of an information in the Police Court of the District of Columbia, charging the defendant with conducting the business of a second-hand dealer in personal property, without license (R., 25).

Thereafter, the defendant duly entered the following proceedings:

1. She appeared specially and moved to quash the service of summons because it was executed on Sunday in violation of Section 372, Title 24 of the D. C. Code (R., 5). This motion was denied and exception noted.

2. She filed an affidavit of prejudice against Judge Schuldt, based upon circumstances arising out of a prior case against the defendant, in which Schuldt presided (R., 8). This application for change of judge was likewise denied and exception noted.

3. She applied for a bill of particulars in view of the very general specifications of the information (R., 3). This was also denied and exception taken.

4. She demanded a jury trial, which the judge denied (R., 19) and exception taken.

Trial thereupon being had, defendant was found guilty and sentenced to $300.00 fine or sixty days in jail (R., 33).

Defendant thereupon moved for a new trial upon assigned errors, which motion was denied (R., 10, 40-3).

Thereupon defendant applied to the Court of Appeals for a writ of error, which was granted (R., 49), and in the Court of Appeals the following propositions were among those urged as the basis of reversal of the judgment of conviction:

1. That the defendant was entitled to a jury trial.

2. That the record was insufficient to show that the defendant was carrying on the business of a second-hand dealer.

3. That defendant's rights were prejudicially affected by curtailment of cross examination of the prosecution witnesses.

4. That defendant, under all of the record, had not been given a fair trial.

The Court of Appeals sustained defendant's point as to the right of jury trial, but, without discussion, denied the other contentions of the defendant.

All of the points urged below on behalf of the defendant are again asserted in support of the decision of the Court of Appeals which set aside the judgment of conviction, in the trial court.

The particular record facts under each point, will be noted in the following argument:

Argument.

The petition and brief on certiorari presents the jury question alone. Respondent, while asserting that the defendant was entitled to a trial by jury, and that the decision of the Court of Appeals on that point was right, does not desire to rest her case on this point alone, but urges other specific contentions which were also presented to the Court of Appeals.

It is our understanding of the rule, that this court in reviewing the proceedings below, may consider all contentions of *respondent* duly presented below, even though the petition for certiorari is based on a single proposition, as such additional contentions are for the purpose of *sustaining* the judgment of the Court of Appeals.

Respondent's attack below was on the judgment of conviction. The contentions below were all directed to that end. If any of defendant's contentions were sound, the decision of the Court of Appeals should stand and the trial judgment should be reversed.

It, therefore, follows that a reversal on the *jury* question alone would not suffice in this court, if the record plainly discloses that the conviction cannot stand by rea-

son of other distinct contentions duly presented to the Court of Appeals. Thus, the Court should consider *all contentions* made by respondent below (Judicial Code, Secs. 240 and 269).

The following cases support this rule:

Sun Office v. Scott, 284 U. S. 177, 182;
Story Co. v. Paterson Co., 282 U. S. 555, 560;
Cole v. Ralph, 252 U. S. 286;
Camp v. Gress, 250 U. S. 308, 318;
Watts Co. v. Union, etc., 248 U. S. 9, 21;
Denver v. Trust Company, 229 U. S. 123;
Panama Co. v. Napier Co., 166 U. S. 280.

I.

Defendant was entitled to a jury trial.

Little can be added to the comprehensive opinion below. As the opinion points out, many summary trials and conviction were permitted at common law (Harvard Law Review, June, 1926). But, it is to be observed, each such summary punishment depended on a special law.

Paley on Summary Convictions, 46, Sect. 7;
Blackstone, 4, Chap. 20, page 280.

The numerous statutes cited by petitioner (pp. 11-43) show that a special act was necessary to authorize administration of summary punishment even at common law.

Petitioner contends (pp. 7-10) that if an offense was subject to summary punishment at common law, it necessarily must still be classified as a petty offense, regardless of any recent increase in the imposed penalty.

License violations do not appear to have been contemplated under the common law, so apparently there was no common law rule with respect to cases analogous to the

one at bar; and as pointed out above, in the absence of a specific statute, power to impose summary punishment would not exist.

It is interesting to observe that in many state courts, today, jury trials are now being granted in prosecutions for violations of analogous license statutes.

State v. Checkver, 96 Atl. 202 (Del.) (Junk Dealer);
State v. Goldenberg, 108 Atl. 137 (Del.) (Junk Dealer);
Commonwealth v. Hood, 66 N. E. 722 (Mass.) (Second-hand Articles);
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Morgan Co. v. Commonwealth, 109 S. W. 907 (Ky.) (Sewing Machines);
State v. Steward, 116 N. W. 693 (Ia.) (Sale of Medicine);
Launder v. City, 111 Ill. 291 (Pawnbroker);
State v. Cohen, 84 N. C. 771 (Attorney's license);
Lasley v. District of Columbia, 14 App. D. C. 407.

It is asserted that license prosecutions are usually accorded regular criminal procedure.

37 Corpus Juris 264 (55), 269 (163).

Ever since the decision of this court in the Schick case (195 U. S. 65) it has been plain that either the *nature* of

an offense or the *prescribed punishment* might determine the right to a trial by a jury. It is thus reasonable to conclude that even with respect to an offense denominated as petty under the common law and which was subject to summary punishment at common law, if, in more modern times, the punishment shall have been increased from a *petty* degree to a *substantial* degree, the rule of summary punishment at common law would no longer apply. The offense would, because of the severity of the punishment, be entitled to a classification as a criminal offense, and therefore come within the constitutional provision granting the right to a jury trial.

Thus counsel for the District of Columbia in the case of Colts v. The District of Columbia (232 U. S. 63) in discussing the decision of this court in Callan v. Wilson (127 U. S. 540), argued (p. 65):

> "Certainly, if offenses which were once petty are to be punished severely, a trial by jury must be allowed; and it must be equally true that, if Congress decided that an offense shall be given a petty punishment, persons who are accused of such facts may be tried as for petty offenses. As said in People v. Craig, 195 N. Y. 190—'It is not the mere name of a crime but the punishment therefor that characterizes it.' "

This expression from the legal representative of the District in the Colts case, is pertinent to the history of the instant license statute.

In 1871, a licensing act* was passed by the District Assembly, which fixed the penalty for violation at a fine of *not less than $5.00 or more than $50.00, without imprisonment.* It is interesting to note that in a prosecution under this original act, a jury trial was permitted.

Lasley v. District, 14 App. D. C. 407.

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*Act of Legislative Assembly, August 23, 1871, as amended by Act of Congress of March 2, 1891, Chapter 521, 26 Stat. 841.

Later, in 1902, by amendment,* the offense was made punishable by not to exceed $500.00 fine *and thirty days in jail,* in default of payment. At this period, the defendant was entitled to appeal, and secure a jury trial in the Supreme Court of the District (Sections 1073-7, 773, R. S., Dist. of Col.). It was not until 1925, that right of appeal was withdrawn, and right of trial by jury was likewise limited to cases involving punishment in excess of 90 days' imprisonment and $300.00 fine.

Thus, by the last amendment to the statute in 1932,** under which defendant is being prosecuted (Pet.'s Brief, p. 8) an existing penalty of not more than $300.00 fine or *not more than ninety days in jail,* is provided. In view of the constant increase in severity of sentence covering this offense, may we not agree with District counsel in the Colt case, "If offenses which were once petty, are to be punished severely, a trial by jury must be allowed."

Thus, when the Schick case was decided (195 U. S. 65) (1903) this court pointed out that the applicable statute then in force in the District concerning jury trials, fixed the punishment in summary convictions at not more than $50.00 fine and not more than thirty days in jail (Sect. 44). This limit, petitioner now urges, may lawfully be raised to $300.00 fine and three months in jail, and still be denominated as a "petty" punishment!

Before the Court of Appeals, in the case at bar, counsel for the District asserted (p. 5, C. A. brief) that:

> "• • • there can be no question that the charge of operating a business without a license is a misdemeanor in the District of Columbia, and is, therefore, a criminal offense."

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*Section 906, Title 20, District Code, 32 Stat. 628, 39 Stat. 1046.

**Act of July 1, 1932, 47 Stat. 550.

This position is in harmony with the position taken by the District in the Colt case (supra), and is difficult to reconcile with the claim now made that the offense and its punishment, is trivial and petty.

The state court citations noted by petitioner (pp. 34, 43) may be compared with other state citations defining the character of "trivial" matters.

Ragsdale v. City, 82 S. E. 77, Va.;
Holly v. City, 57 S. W. 491, Ky.;
State v. Lieberman, 26 Neb. 464;
Natal v. Louisiana, 139 U. S. 621.

Or indeed, such cases may be compared with other state decisions holding trial by jury necessary in all cases where *any imprisonment* is provided.

Simmons v. State, 75 Ohio St. 346;
City v. Keating, 118 N. E. 114 (Ohio);
1 Dillon Mun. Corp., 411, 433;
Ex parte Johnson, 161 Pac. 1097 (Okl.).

State cases may be found, permitting summary convictions without a jury, where appeals afford a later jury trial.

State v. Lytle, 51 S. E. 66, N. C.

But this method of providing jury trial by appeal does not seem in harmony with the decision of this court, and no such jury trial, on appeal, has been available here, since the 1925 amendment.

Callon v. Wilson, 127 U. S. 540.

In summary, we think it fair to state that the various state decisions seem quite irreconcilable, and not unnaturally so, since jury provisions in the various state con-

stitutions differ widely. But these cases do, generally, establish the following conclusions:

(a) That summary punishment at common law usually depended on a specific statute.

(b) That the punishment usually viewed as "trivial" are not comparable in severity with the punishment here involved.

(c) That severity of sentence is a controlling feature in determining right to a jury trial.

(d) That the severity of sentence for the instant offense has been increased from $50.00 fine, *without imprisonment*, to $300.00 fine, *with ninety days imprisonment;* since the Schick case.

(e) That in license cases in the state courts, jury trials are commonly afforded.

The Court of Appeals concluded that two criterions existed to aid the court in determining the mooted question:

1. Was the offense subject to jury trial at common law? If so, a right to jury trial now exists regardless of existing class of offense, or penalty imposed.

2. Is the provided punishment so severe that such punishment cannot be considered as either petty or trivial, and, therefore, prevents the offense from being considered petty or trivial in determining the right to jury trial? If so, regardless of the practice at common law, or the nature of the offense, a jury trial should be afforded.

This analysis is, we think, in accord with the language of this court in the Schick case (195 U. S. 65).

Thus the Court of Appeals gave weight to the fact that no right of appeal from the District Police Court exists, a fact which petitioner insists is immaterial. It is true that appeals are statutory, but is not the Court of Appeals justified when considering the question of severity,—which the District itself recognized in the Colt case was important—in considering also the finality of the sentence? The real aim should be to afford a fair trial before imposing imprisonment, with consequent loss of liberty and good name. If the imprisonment is substantial, and not trivial, *final* summary judgment by a judge is difficult to harmonize with the spirit of the Federal Constitutional provisions. The danger, and therefore the seriousness, of the situation, seems intensified by the absence of any right of appeal.

The argument of petitioner under Point II and the voluminous collections of ancient laws and decisions from before the Magna Charter, is put forth because of the provision in Section 44 of the Code of the District of Columbia, 1901 (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119) which reads:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial shall be by jury * * *".

It is argued from these ancient cases, that the defendant "*would not by force of the Constitution, be entitled to a trial by jury*".

The argument is, if we understand it, that if it were the practice prior to the adoption of the Constitution, either under Acts of Parliament the Common Law or Colonial

Statutes, to summarily try without a jury certain criminal offenses, that this power is still retained under the aforesaid Act of Congress. But the vice of this argument is that Congress did not have the power to extend the clear limitations of the Constitution by any such assumed interpretation of its meaning.

It was not the intent of the framers of the Constitution to empower Congress to resurrect and enact in direct violation of its terms, all of the ancient statutes of England and the Colonies which they had not written into the Constitution. The petitioner's contention in this respect is completely destroyed by the long list of decisions from Ex Parte Bollman, 4th Cranch. 75, and authorities herein cited down to date; that there was no common law criminal offense existing in the Federal Courts. The Federal Courts having jurisdiction in criminal matters only by statutory authority.

No decision can be found that Congress had the power to grant to the Police Courts of the District of Columbia a greater power over the lives and liberties of the citizens, than was possessed by the Police Courts of other states.

Prior to the amendment of the Code of the District of Columbia in 1925, it was provided by Sections 1073, 1074, 1075, 1077 and Section 773 of the Revised Statutes of the District of Columbia, that a right of appeal to the Supreme Court and a trial by jury de novo, as though the case had originated there, was allowed, but when this provision was repealed and the Police Courts were vested by the amendment of 1925 with absolute power to try without a jury a case involving a prison sentence and a large fine, and where no election of the right to try by jury and no appeal allowed from its decision, the Constitutional guarantee of the citizen of a trial by jury under the Constitution, was taken from him. Even the right of appeal to the Supreme Court, and a trial de novo was held not to satisfy the guarantee of the right of trial in the first instance, as provided in the Constitution.

Charles A. Dana, the publisher was arrested in New York City upon a warrant from the Police Court of the District of Columbia, charging him with having published a criminal libel. He sued out a writ of habeas corpus in the Southern District of the State of New York where Mr. Justice Blatchford discharged him from arrest upon the ground that "if brought to this district he would be tried in a manner forbidden by the Constitution", namely, by a Police Court without a jury, although he would then have had the right of appeal and trial de novo in the Supreme Court. See re: Charles A. Dana, 7 Benedict 14; Callan v. Wilson, 127 U. S. 540, where the conviction was reversed and the prisoner discharged because he had not had a jury trial.

A quotation from the opinion in the Callan case on page 9 of respondent's brief, is misleading as to what was decided. The petitioner would have the Court infer that in the Callan v. Wilson case, the court conceded that there was a class of "petty" or minor offenses not usually embraced in criminal statutes, which if committed in this district, "may under the authority of Congress, be tried by the Court and without a jury". There was no such concession whatever by the Court as is stated in petitioner's brief. The true meaning of the Court was in the sense as if the Court had said, "Conceding for the sake of argument that there was a class of petty or minor offenses which may, under the act of Congress be tried in the District of Columbia without a jury, this case (Callan v. Wilson) is not one of them". However, even though the court had made such a concession plain and evident in its opinion it would have been mere obiter dicta as that question was not before the court. The only issue involved was the right of a defendant to *waive* a jury in a criminal prosecution.

The arbitrary and final powers vested in the Police justices of the District of Columbia which exist nowhere else in the United States of America or its Colonial possessions

where the Constitution is in force, was the controlling point in Judge Groner's able decision, wherein he said:

> "And in considering the question as applied solely to the District of Columbia, it is not amiss to refer to the fact that under the present statute there is not only a denial of a jury trial, but there is no appeal of right to any Supreme Court. The decision of the Magistrate is final unless upon application to this Court we elect to exercise the power of review; and if we do we are by rule confined to questions of law and may not weigh the evidence. In most of the states, the mechanics of the law provide either the right of election or the power of the accused to be held over for a trial in a court, with a jury, or an appeal of right to a higher court to review the judgment of the Magistrate. The omission of either provision cannot be and should not be lightly overlooked."

In his decision Judge Groner further said:

> "Laying aside the imposition of a fine of $300, the right to imprisonment for three months involves a proposition of real seriousness to inflict upon the accused summarily imprisonment in a common jail for that length of time, and at the same time, to deny him of right of an appeal to the court of record is a matter which cannot be whistled down the wind with the statement that court business must go on * * * that dockets must be cleared * * * or that the requirements of jury service should not be expanded to the loss of the citizen in his private affairs."

In this connection on page 44 of the respondent's brief, it is stated:

> "During the fiscal year 1934, approximately 400 persons were charged with the violation of this act, and in 1935 more than 380 such violations were charged."

By reason of which an appeal is made that this constitutional guarantee to the citizen of a jury trial, should be denied, that the Police Court may dispose of its business unhampered by any such antiquated guarantees of a jury trial found in the Constitution.

We submit that no policy of convenience should be permitted to prevail that would ultimately destroy the safeguards of liberty under the Constitution. Such a policy has frequently been commented upon and discouraged by this court (See Dimick v. Schiedt, 293 U. S. 486).

It is most probable that the exercise of this unusual and unauthorized power by the Police Court of the District of Columbia, has resulted in the volume of business of 1934 and 1935 of which the petitioner informs the Court, for it is a known historical fact, that it is a weakness of human nature to abuse and to extend the powers granted them, and that is particularly true of Justices of the Peace, of Police Magistrates and other similar officers of the law.

It was the knowledge of this prone weakness of human nature, and the abuse of power, that caused the framers of the Constitution to write into it the bill of rights which this court has steadfastly and zealously guarded and upheld, to the everlasting gratitude of a free people. When this act was originally adopted a fine of $50.00 was provided and imprisonment not to exceed thirty days. Thereafter, Congress increased the fine of $300 and imprisonment not to exceed three months.

Who can say that the next Congress may not see fit to increase this fine to $1,000 and the imprisonment to one year, or that a succeeding Congress will not still further increase the fine and the imprisonment, or that the Police Magistrates may not be vested to summarily dispose of all offenses enumerated on petitioner's brief, pages 11-34, unless Congress is restrained by the Constitutional guarantee which we invoke in behalf of this respondent.

Blackstone, 4, Chapter 27, page 350, wrote as follows:

"And, however convenient these may appear at first (as doubtless all arbitrary powers well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in matters of the most momentous concern".

How prophetic are these words in view of the increase of power that Congress has conferred on the Police Court of the District of Columbia in the present amendment granting such final extensive and arbitrary powers to said Police Court of District of Columbia without the right of an appeal to an accused.

It should also be observed that in all the cases cited under Point II of petitioner's brief the punishment for the crime was pursuant to a statute deriving its authority from the Constitution of the various state or some higher organic law and that in most all of those cases the right of an appeal was allowed. As the offense here charged was unknown to the Common Law and as there is no Common Law in the Federal Courts, we must look to the authority for the prosecution in some statute.

As the Act of Congress *defines* the offense, fixes the punishment, and designates the police judge of District of Columbia to try the accused, it would seem that the argument of petitioner's brief, Point II, with respect to the powers of Justices of peace, police courts, other minor judicial officers, becomes purely academic and calls for no extended review.

However, we think the remarks of Judge Chase in U. S. v. Morrall, 2 Dallas 395 are as appropriate here as when these words were written many years ago:

"But the question recurs when and how have the courts of United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can commit it to their judicial agents. Now the United States did not bring it with them from England. The Constitution did not create it, and no act of Congress has assumed it. Besides what is the common law we are referred? Is it the common law entire as it exists in England or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire or Pennsylvania or Connecticut?"

Constitutional Law of United States; Willoughby, Volume 2, page 1319, Secs. 841-842;
Keller v. U. S., 213 U. S. 138, and authorities cited, page 145;
Cooley's Constitutional Limitations 574;
Wheaton v. Peters, 8 Pet. 591;
U. S. v. Britton, 108 U. S. 199;
U. S. v. Hudson, 7 Cranch. 32;
Tennessee v. Davis, 100 U. S. 257;
Smith v. Alabama, 124 U. S. 465;
Peters v. U. S., 94 Fed. Rep. 127, in which the Court said:

"It must be borne in mind that national courts do not resort to common law as the source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the punishment, and to confer the jurisdiction for trial. U. S. v. Walsh, 5 Dill. 60; U. S. v. Martin, 4 Cliff. 156; In re Greene, 52 Fed. 104; Swift v. Railroad Co., 64 Fed. 59; U. S. v. Hudson, 7 Cranch. 32; U. S. v. Coolidge,

1 Wheat. 415; U. S. v. Britton, 108 U. S. 199; U. S. v. Eaton, 144 U. S. 687; Manchester v. Mass, 139 U. S. 240, and cases cited on page 263; Butler v. Boston Steamship Co., 130 U. S. 527; Jones v. U. S., 137 U. S. 202, at page 211; U. S. v. Dietrich, 126 Fed. 676; Byrne Federal Criminal Procedure (Section 1), citing under the text Ex parte Fiske, 113 U. S. 713; Jones v. U. S., 162 Fed. 417, and many other cases."

It has been impossible to review all of these cases and it will not be undertaken but referring to People Ex Rel. Murray v. Justices (1878), 74 N. Y. 406; People Ex Rel. Cosgriff v. Craig, 1903, 195 N. Y. 190, and other cases there cited to the effect that the Special Sessions of the City of New York and Magistrates' Court exercised jurisdiction over minor crimes without the intervention of a jury, it is only necessary to say it is well known that until New York adopted a Constitutional Amendment, Section 23, Article 6, of its Constitution of 1869 and again 1879, vested this Court with such jurisdiction, any one accused of crime had the right of election to be tried in the Court of General Sessions upon an indictment before a jury and in cases where a person was accused of selling less than 5 gallons of intoxicating liquors without having a license, and where the fine was only $10 and did not exceed $50.00 could not be tried in a court of Special Sessions but was entitled to be tried before a common law jury.

Hill v. People, 20 N. Y. ;
Bahan v. People, 17 N. Y. 516;
The People v. Stevens, 13 Wend. 341;
The People v. Brown, 16 Wend. 561;
Wyndehamer v. People, 13 N. Y. 378;
People Ex Rel. Camaford v. Dutcher, 83 N. Y. 240.

Whatever may have been the practice prior to the adoption of the New York Constitution as indicated on pages

19, 20, 21 and 22 of petitioner's brief with respect to the punishment of minor offenses it is certain that after the adoption of the Constitution of the State of New York and until this Constitution was amended in 1869 and again in 1879 a Court of Special Sessions was not authorized to try misdemeanors without a jury provided the accused elected to be tried by a common law jury; and the very fact that such an amendment was necessary is a forcible argument that there was a tendency not only in the State of New York but in other states to preserve this right to trial by jury and to curtail in a large measure the powers formally exercised by Justices of the Peace and Minor Courts before the Constitution.

Upon the respondent's brief at the bottom of page 7, the petitioner quotes one sentence from the opinion in the Schick case, and on page 8 of this brief takes part of a sentence of the opinion commencing with the word "when" and ending with the word "offenses", to support his argument that the substitution of *"criminal prosecutions"* in the Sixth Amendment for *"Crimes"* in Article 3 of the Constitution, indicated a clear intent to exclude smaller offenses from the Constitutional protection. In fact it is so asserted on petitioner's brief, but this court has said directly to the contrary in its decision in Patton, et al., v. U. S. This Court said, at page 298, in its opinion in that case after quoting the Sixth Amendment:

> "This provision which deals with trials by jury clearly in terms of *privilege*, although occurring later than that in respect to jury trials, contained in the original constitution, is not to be regarded as *modifying or altering* the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments of the original constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision clearly may be regarded as reflecting the

meaning of the former. In other words, the two provisions mean substantially the same thing and this is effect of the holding of this Court in Callan v. Wilson, 127 U. S. 540, 549, where it is said 'and we do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury; *there is no necessary conflict between them.*'" (Italics ours.)

In the Schick case, Mr. Justice Harlan in his very able dissenting opinion stated that the question of the right to waive a constitutional guarantee was "applicable alike in cases of felonies and misdemeanors". This Court said while it adopted as sound the reasoning of Mr. Justice Harlan, "we are unable to find in the decision any convincing ground for holding that waiver is effective in misdemeanor cases but not effective in the case of felonies". The Court in the Patton case decided clearly.

(1) The right of a jury trial was a privilege which the accused may waive.

(2) There was no real distinction in the application of this right as between misdemeanors or felonies.

(3) By Section 24 of the U. S. Judicial Code, Title 28, Section 41, the District Court was vested with full power to try all crimes cognizable under the authorities of U. S. That a jury was not a necessary or an integral part of the Court. "In the absence of a valid consent the District Court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled to the terms of the Constitution to that mode of trial. Since, however, the right to a jury trial may be waived it will be unreasonable to leave the Court powerless to give effect to the

> waiver and itself dispose of the case. * * * The power of the waiver being established this is the clear import of the decision of this Court in Schick v. U. S., 195 U. S. 65, 71." From the opinion prior to this decision and particularly in Low v. U. S., 169 Fed. 86 and Dickinson v. U. S., 159 Fed. 801 and Schick v. U. S., 195 U. S. 65, and in many of other cases the Courts have held that the presence of a jury constituted and was an integral and constitutional part of the Court, and for that reason was a constitutional right which could not be waived in felony cases.
>
> Patton v. U. S., supra, reversed this holding and held that under the Judicial Code, supra, it was the Court which was vested with power to try and the right of a jury was a mere privilege to the accused which he might waive.

In this connection it seems unreasonable that Congress would empower a police magistrate to try a crime without a jury yet withhold this right from a U. S. District Court unless the accused waived such right to a jury.

II.

Is the record sufficient to sustain a judgment that the defendant was "engaged in the business of dealer in second-hand personal property"?

The information (R., 1) charges that the defendant "engaged in the *business* of dealer in second-hand personal property on the twenty-fourth day of March, 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information (May 13, 1935).

The only offense defined in the District statute is "engaging in the business" of dealing in second-hand property. It is no offense to sell a railroad ticket under this statute, and it follows that it would be no offense, per se, to sell more than one railroad ticket either at one time or at different times. To be guilty under this statute, the defendant must be *engaged in the business* of selling such tickets. Petitioner states this Act is a reveune measure:

> "But a single Act cannot be taxed as a privilege; only a business may be taxed."
>
> Trentham v. Moore, 111 Tenn. 346;
> Comm. v. Hayes, 107 Ky. 655.

The Courts have defined the meaning of such statutes. "The term 'business' • • • means that employment which occupies the time, attention and labor of the person so engaged, for the purpose of a livelihood or of profit. • • • The ordinance has reference to regular and legal employment, not employment that is occasional, irregular or illegal."

> Braxton v. City, 79 So. 150, Ala.;
> Martin v. State, 59 Ala. 34;
> Merritt v. State, 19 Tex. App. 435;
> U. S. v. Kenton, 26 Fed. Cas. 763 (15526);
> Florsheim Bros. v. Lester, 60 Ark. 120;
> Steam Heating Co. v. Company, 60 Mo. App. 148;
> Gates v. Cohen, 7 Calif. App. 341;
> Babbitt v. Field, 52 Pac. 775, Ariz.;
> Ammons v. Company, 141 Fed. 570;
> Gilcrist v. Company, 47 Fed. 593;
> People v. Silver, 158 App. Div. 217;
> People v. Deudehauser, 130 App. Div. 760; 195 N. Y. 554.

In support of this information, the prosecution offered the following testimony:

(1) The witness Baxier testified:

> "he purchased a return ticket to New York City for $1.50 from the defendant at 8:28 A. M., May 24, 1934" (R., 19).

(2) The witnesses Mrs. Evelyn Simmons and her husband Earl R. Simmons, testified:

> "On April 7, 1935, she and her husband approached defendant and bought two tickets to New York City; that defendant told her she expected some friends to come off the excursion train and that she would let her have the tickets; witness paid $3.00" (R., 20).

Mr. Simmons testified:

> "He was present when his wife made a purchase of return excursion tickets at Washington, D. C., but did not see the money pass on the seventh of April, 1935, though he was with her at the time of the alleged purchase. Defendant told him that, if he waited until the excursion train arrived, he could get a ticket to New York City; that she expected several friends off the train."

(3) The same witnesses, Mr. and Mrs. Simmons, together with the witnesses Axline and Leaburger, testified as follows:

Mrs. Simmons:

> "On the twenty-eighth of April, 1935, she approached the defendant at 2:55 P. M. for tickets, but was only able to get one ticket, for which she paid $1.50. Witness came over to the defendant at 2:55 P. M., put her arms around the defendant so that defendant would not be suspicious, in order to get the ticket" (R., 20).

Mr. Simmons:

> "On the twenty-eighth of April, 1935, he was unable to get four return tickets, although witness approached the defendant to secure the same, but that his wife succeeded in getting one from the defendant" (R., 21).

Witness Axline testified:

> "On April 28, 1935, he was present at the Union Station, Washington, D. C., when a purchase was made by Mr. and Mrs. E. R. Simmons, but that he did not see the money pass, but heard the defendant say she only had one ticket and let a cripple man have it" (R., 23).

Witness Leaburger testified:

> "On the twenty-eighth day of April, 1935, Mrs. Evelyn Simmons introduced him to the defendant and asked the defendant for a ticket to New York, to which the defendant informed him she did not have any tickets but would 'phone someone to see if she could get any. He did not succeed in getting a ticket nor did he see any money pass for tickets" (R., 24).

The foregoing are the three instances in the evidence, upon which the prosecution asserts the defendant was *engaged in the business* of a dealer in second-hand property.

The evidence just quoted tends to establish *three separate and distinct sales*, one on March 24, one on April 7, and one on April 28, each sale solicited by the prosecuting witnesses. All of these sales occurred in the Union Station at Washington, D. C., a public place. There was no evidence showing that the defendant solicited anyone, or had or maintained any office at the station, or that she was there for any other purpose than the use of such sta-

tion as a passenger. She, herself, lived in Newark, N. J., and was a transient in Washington. *There is no evidence showing what the defendant's occupation was, that she had no other occupation, or that she had apparatus, paraphernalia, or any of the other adjuncts commonly associated with the carrying on of a business.* The burden of proof was on the prosecution. The only reference in the evidence to the source of the tickets which it is claimed she sold, is the evidence that she said she expected to get some tickets from some friends who were arriving on the train, which affords both a reason for her presence in the depot, as well as an explanation of how she might get possession of such return tickets. This explanation, and the entire evidence in the record, is not only inconsistent with guilt, but is wholly consistent with innocence, and is, therefore, insufficient, under the rule, to establish the commission of a criminal offense.

Cravens v. U. S., 62 Fed. (2d) 261, 274 (8th Cir.);
Patterson v. U. S., 62 Fed. (2d) 968 (10th Cir.).

It is submitted that the proof offered cannot sustain a finding of engaging in business, under the rule of the foregoing cases. It is true that cases may be found where convictions have been sustained of continuing offenses such, for instance, conducting a liquor nuisance, based on a single sale of liquor, but it will be found in practically all such cases that the evidence of surrounding circumstances, the history of the defendant, the existence of a place of business, the presence of supplies, apparatus, or paraphernalia, was necessary and present in support of the evidence of specific sales. Here no such proof was offered. The defendant is a resident of Newark, New Jersey, and nothing appears in the record upon which this conviction can be based except three isolated unsolicited sales made in a public place, under circumstances, which we have heretofore suggested, are certainly as consistent with innocence as with guilt.

We, therefore, submit that the evidence is insufficient as a matter of law to sustain the conviction.

III.

Were the defendant's rights on cross examination of the prosecuting witnesses, prejudicially curtailed?

The record shows that all of the witnesses testifying with respect to sales made by the defendant were investigators in the employ of the railway companies, actively engaged in the apprehension and prosecution of persons claimed to be engaged in the sale of unused railway tickets. *Each of these witnesses, therefore, was an essentially interested witness.* On the other hand, the defendant offered an alibi as her sole defense. Her witnesses testified that during all of the times covered by the evidence, she was at home seriously ill, confined to her bed and under the care of a physician. This evidence is detailed in the record (R., 26 to 31). The contradiction in the testimony, therefore, could not have been more specific and complete.

It is obvious, that, under such circumstances, every right of the defendant with respect to the cross examination of such interested prosecuting witnesses, *should have been meticulously preserved to her.*

Yet we think it may be said conservatively, that, not only were the rights of the defendant *not* observed, but that she was practically "railroaded" to conviction in careless violation of her rights! A brief examination of the evidence will, we think, completely establish this conclusion.

The witness Baxier testified that, in company with Joseph Hector, he purchased a ticket from the defendant. The Court refused, on cross examination, to permit the defendant to inquire whether Hector was in court (R., 19); whether the witness wanted the Court to believe that the defendant, a white person, approached the witness and

asked him to buy a ticket, when there were at least three thousand people in the station in transit (R., 19); did the defendant take the money out of the witness's hands as testified on direct examination (R., 20). Strangely enough, the witness Baxier testified that, in spite of his testimony on direct examination, he actually purchased the ticket from someone other than the defendant (R., 20).

Evelyn R. Simmons, another witness, on cross examination, was excused from answering whether she came to Washington by pre-arrangement, the time when she did reach Washington on the alleged dates of purchase, and the address of the railway inspection company by whom the witness claimed to have been employed (R., 20). This witness admitted on cross examination she purchased the ticket from someone else (R., 20).

Her husband, Earl R. Simmons, on cross examination was not permitted to answer whether the defendant was pointed out to him before the purchase was made; whether he came to Washington by pre-arrangement; whether he made a purchase from anyone other than the defendant; or what time of day he arrived in Washington on the dates of purchase (R., 21).

This witness testified on direct examination that one Axline and Leaburger was present at the time of purchase (R., 23). On cross examination he was not permitted to tell whether these men were known to him, or where the witness's residence was, or whether he knew that the defendant was engaged in litigation with the Pennsylvania Railroad Company, as a result of an accident.

The witness Axline, on cross examination, was not permitted to answer whether he had made a purchase of tickets from anyone other than the defendant; or whether he had any trouble in knowing the defendant as the defendant who was representing herself upon the trial; or whether he saw the defendant before the date of purchase (R., 23).

The witness Leaburger said that no ticket was purchased on April 28th, but that the defendant stated she had no

tickets, but would phone and see if she could get any, and that he did not get a ticket, and so no money passed. On cross examination, he was not permitted to answer whether he knew defendant was about to sue the Railway Company for damages for an accident occurring on November 4, 1934; or that he knew that a settlement had been offered by a railroad company in such case, which settlement was refused by the defendant; or that he knew Mr. and Mrs. Simmons, other witnesses in the case, before meeting them on April 28th; or that the witnesses all came to Washington by pre-arrangement (R., 24).

It is interesting to note, from the record, that, when the *defendant's witness Clawans* (R., 29) testified, she was asked by the prosecuting attorney whether she had not "come down to Washington to testify *by pre-arrangement*". The defendant objected and the trial court, after having sustained objections to all of such questions when asked by the defendant, overruled the objection and directed the witness to answer!

In addition to the foregoing, defendant's witness Mueller, testified that she overhead, in the court room, the prosecuting witnesses say that they intended to "railroad" the defendant, whereupon the Court refused to allow the witness to testify further with respect to such occurrences in the court room (R., 20).

It seems perfectly obvious, that when the identity of the defendant was directly in issue, and the prosecuting witnesses were themselves interested witnesses by reason of their employment, that each of the above questions asked on cross examination was competent and relevant on either the question of the identification of the defendant or the interest of the witnesses, thus raising questions of credibility.

It is apparent that the trial court literally paid no attention to the rights of the defendant in connection with the cross examination of these witnesses.

In the case of United States v. Alford, 282 U. S. 687, is a recent statement by this Court of the rule with respect

to cross examination of interested witnesses. In the Alford case, the question asked was simply "where do you live"? The refusal of the trial court to permit an answer to such a question was made the basis by the Supreme Court for reversal of the case, notwithstanding the fact that the conviction had been affirmed in the Circuit Court of Appeals. The instances of limitation on cross examination here submitted are such that the rule there announced by this court in the Alford case, would seem peculiarly applicable.

IV.

Was the defendant given a fair trial?

Defendant was a young woman prosecuted in a district foreign to her residence. She had been in ill health (R., 7), and had previously had trouble with the judge assigned to try her case, and, as a result, filed an affidavit of prejudice, which was denied. She then asked for a bill of particulars, a request which seems reasonable in view of the general nature of the information. This was refused and she then demanded a jury trial, which was denied. Various difficulties, as shown in the bill of exceptions, arose between the court and defendant, particularly with respect to continuances and with respect to the discharge of the prosecuting witnesses. Offered testimony to show the active bias and interest of the prosecuting witnesses was refused (R., 20, 30). She was not permitted to ascertain where the prosecution witnesses came from, their employment, their residence, purpose of their trip to Washington or, in fact, any important details which might serve to attack their accuracy or credibility and, at the same time, aid her defense of alibi. Imposition of summary judgment accentuated the wrong which became, as to the acts involved irrevocable, due to the absence of any review of fact by appeal or writ of error.

For this offense, which petitioner now asserts is petty and trivial, she was required to furnish a bond of $500.00 (R., 2) and, upon her conviction, she received a "trivial" sentence in a District jail of $300.00 fine or sixty days' imprisonment, which sentence, in view of her poverty,—which the Court of Appeals recognized and allowed under a plea *in forma pauperis*,—of course, meant the suffering of such imprisonment.

Under such circumstances, we assert that it should be affirmatively found that the defendant did not receive a fair and impartial trial.

V.

The statute under which respondent was convicted provided for a fine of $300.00 or 90 days in jail. An infraction of this law undoubtedly constituted a crime against the laws of the District of Columbia.

The petitioner under Point IV, beginning on page 43 and ending on page 47, argues that Congress has properly treated a violation of this law as a "petty offense".

Respondent has searched in vain for any decision or law or other evidence that Congress has treated an infraction of this law as a "petty offense." The petitioner's statement is misleading; the only authority for any such statement is the second paragraph of Section 44 of the 1901 Code of District of Columbia, paragraph 31, Statute 1189 as amended by the Act of Congress approved March 3, 1935 (43 Statute 1119) wherein it provided in cases where the accused would not by force of the Constitution be entitled to be tried by a jury, the trial may be without a jury, but neither Congress or the Courts have in any decision under this statute said that this offense was a petty offense. The only authoritative decision on this point is the decision of the United States Court of Appeals for the District of Columbia in this case, in which there was unanimous deci-

sion holding exactly the reverse of petitioner's argument under Point IV (See opinion of Justice Groner, 84 Fed. [2nd] 265).

It cannot be reasonably said that a conviction under a statute which imposes a $300 fine or in lieu thereof 90 days' sentence in jail or upon failure to pay the fine, 90 days in jail is not a serious crime, subjecting the accused to great inconvenience, indignity and humiliation, and as well as placing a lasting stigma upon her reputation.

The petitioner's argument under this point, that this is a petty offense is quite the reverse of its argument in United States Court of Appeals for the District of Columbia when it sought to justify the arrest on Sunday, the Lord's Day, in direct contravention of Section 372 of the Code of Law of the District of Columbia. To justify this arrest on Sunday the petitioner here not only desperately but vainly attempted to show the Court that this statute prohibiting the arrest on Sunday had been repealed by implication and ought not to be in the Code, but went further to justify the arrest claiming that the offense charged was a crime and by reason thereof was not protected by the provision of Section 372 which prohibited an arrest on Sunday.

We respectfully refer to the petitioner's argument in that Court under Point I, page 3 to page 5, inclusive. The concluding words of its argument on this point are as follows:

> "There can be no question that the charge of operating a business without a license is a misdemeanor in the District of Columbia and therefore a *criminal offense*".

It also quotes in support of this argument Williamson v. U. S., 207 U. S. 425, and many other cases, as well as text writers to the effect that "All criminal cases and proceedings whatsoever" are embraced within the terms of treason, felony and *breach of peace* and therefore this

being a *criminal offense* was not protected by Section 372 of Code of Laws of District of Columbia.

VI.

Respondent concedes that she did not have a right of an appeal.

The petitioner argues under Point V of its brief that the absence of an absolute right of an appeal does not effect the right of a trial by jury and cites several cases in support of this argument on page 47 of its brief; an examination of those cases will disclose that the appellant in each case had not pursued in the manner and form the remedy provided for an appeal and therefore had not been denied "due process of law". However, the fact that a right of an appeal is not an absolute one is a potent reason why one charged with a criminal offense under a law which does not allow this right of appeal, should have a jury pass upon the fact of her guilt or innocence as provided by the Constitution of the United States (see Dimick v. Schiedt, 293 U. S., p. 486 and authorities cited). See also opinion of Justice Groner, 84 Fed. (2nd) 265.

VII.

The opinion of the lower court is in accord with the decisions of this court and the best considered cases in the highest court of the states as well as numerous decisions in the Circuit Court of Appeals.

The petitioner under Point VI argues that the opinion of the lower court is inconsistent with the decisions of this court, but it has failed to point in any one single instance where this court has decided contrary to the opinion of Mr. Justice Groner.

The petitioner has frankly admitted on page 43 of its brief that the case of Frank v. U. S. (1911, C. C. A., 6th Cir-

cuit, 192 F. 864) was the only case that it had been able to find bearing upon the subject. We have heretofore pointed out that this case had no application to the issue here for the reason that the decision in that case was on stipulation of counsel that the offense was a "petty one"; that the act under which the prosecution was had there did not provide for any *jail sentence,* and upon stipulation of counsel the trial court concurred under the authority of Callan v. Wilson, 127 U. S. 540, and Schick v. U. S., 195 U. S. 65.

There is not a decision of this court or of any Federal Court defining clearly what is or what is not a *"petty offense"*.

The last statement has been asserted by the decisions in several cases hereinbefore cited.

At the bottom of page 49, the petitioner cites several cases, to wit, Patton v. U. S., 281 U. S. 276, Callan v. Wilson, 127 U. S. 540, Dimick v. Schiedt, 293 U. S. 486, West v. Ganmon, 98 Fed. 426, to the effect that the guarantee of a trial by jury has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England, when the Constitution was adopted. This means nothing more than that the word jury when used in the Constitution means a jury of 12 men and that any less number is not within the meaning of the Constitution. This proposition is not denied and is not an issue in this case. It is conceded that for the meaning of terms or words in the Constitution we may look to the common law as a guide, but in so far as the substantive law is concerned, the Federal Courts are bound by the limitations therein and Congress has not the power to provide any other mode of trial. The logical result of petitioner's argument is that Congress could provide a trial without a jury in any case where before the adoption of the Constitution such a case had been tried either under an act of Parliament in the Colonies summarily without a jury regardless of the nature of the offense or the punish-

ment. This we deny. And assert that even if Congress were to attempt to define what was a petty offense triable by a jury, such an act would still be subject to the Constitutional limitation and to judicial review by the Courts.

CONCLUSION.

The Court of Appeals found our propositions 2, 3 and 4 "without substance" (R., 58). The lack of discussion of them by the court below makes us apprehend that the court concluded, that, since the ruling made required a new trial, the errors in question did not require measured attention. Petitioner was asked a review on the jury question alone. We assert that not only was the jury question rightly decided below, but that, in addition, each of the other three propositions which were advanced below, and which are again presented here, if considered, should require the reversal of the judgment of conviction. Thus regardless whether the decision below as to the right of jury trial, was right, the judgment of the Court of Appeals reversing the judgment of conviction in the trial court, should be affirmed, and that respondent may have such relief as she may be entitled to on the entire record.

Respectfully submitted,

SETH W. RICHARDSON,
815 15th Street, N. W.,
Washington, D. C.

ALLEN CARUTHERS,
551 5th Avenue,
New York City, N. Y.,

LILLIAN CLAWANS,
116 Market Street,
Newark, N. J.,
Attorneys for Respondent.

DAVIES, BERBE, BUSICK & RICHARDSON,
of Counsel.